Supreme Court, U.S.
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No. 97-1828

In The

# Supreme Court of the United States

October Term, 1997

OMEGA ENVIRONMENTAL, INC., *et al.*,

*Petitioners,*

*vs.*

GILBARCO INC.,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly held that the record in this case, viewed in the light most favorable to Petitioners, contains insufficient evidence of anticompetitive foreclosure to support a jury finding that Respondent had violated Section 3 of the Clayton Act.

## RULE 29.6 LISTING

Respondent Gilbarco Inc. ("Gilbarco") is a Delaware corporation. Gilbarco's sole shareholder is a holding company that is in turn wholly owned by General Electric Company P.L.C.

Gilbarco has the following non-wholly owned subsidiary: Chan Gi (China).

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**APPENDIX**

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## OPINIONS BELOW

The district court's pre-trial summary judgment opinion (App., *infra*, 1a), is unreported. The opinion of the court of appeals (Pet. App. A1-A57), is reported at 127 F.3d 1157.

## STATUTORY PROVISION INVOLVED

Section 3 of the Clayton Act provides in relevant part:

> It shall be unlawful for any person . . . to lease or make a sale or contract for sale of goods . . . for use, consumption or resale . . . , or fix a price charged therefor, . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14. *See* Pet. App. D1-D2.

## COUNTER STATEMENT OF THE CASE

The decision of the court of appeals proclaims no new rule of law and conflicts with no decisions of this Court or of any other circuit. The court applied antitrust principles established by this Court in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) — and consistently followed by the lower courts — for imposing exclusive dealing liability under section 3 of the Clayton Act. The court carefully analyzed the complex factual record and held that the undisputed facts in this dealer-termination dispute were insufficient as a matter of law to

establish liability. Petitioners point to no evidence that would justify reversal of the Ninth Circuit's careful, fact-based analysis.

## I. Facts

The court of appeals correctly summarized the evidence submitted during the three-week trial. *See* Pet. App. A3-A7. The record before the court consisted of 17 volumes of record excerpts.[1]

Respondent Gilbarco Inc. ("Gilbarco") and four other companies — Dresser-Wayne, Tokheim, Schlumberger, and Bennett — manufacture retail gasoline dispensers used by filling stations and other establishments to sell fuel to retail customers. Retail gasoline dispensers are highly differentiated products, available with many different components and options.[2] Gilbarco's retail dispensers are widely recognized as the best in the industry.[3]

Like its competitors, Gilbarco makes a large portion of its sales of retail dispensers directly to end-users — major oil

1. *See* Defendant's Excerpts of Record ("ER") (four volumes); Defendant's Confidential Excerpts of Record ("CER") (one volume); Plaintiffs' Supplemental Excerpts of Record ("SER") (four volumes); Plaintiffs' Confidential Supplemental Excerpts of Record ("CSER") (one volume); Defendant's Supplemental Excerpts of Record ("GSER") (one volume); Defendant's Confidential Supplemental Excerpts of Record ("GCSER") (one volume); Rochester Petroleum Equipment's Confidential Supplemental Excerpts of Record (two volumes); Plaintiffs' Reply Excerpts of Record (one volume); Plaintiffs' Confidential Reply Excerpts of Record (one volume).

2. (ER 231; SER 559).

3. *See* Pet. App. A5. Petitioners conceded this. (ER 581-82, 587). Their expert witness also acknowledged that Gilbarco earned its growth in market share through efficiency and innovation. (ER 781).

companies that operate filling stations like Exxon, Shell, Chevron, Mobil, Texaco and Amoco, and smaller customers as well. Gilbarco makes the rest of its sales through a network of distributors, who in turn sell to end-users. Gilbarco has a policy of maintaining distribution agreements only with distributors that do not also act as authorized distributors of retail dispensers manufactured by Gilbarco's rivals.[4] Gilbarco has followed this policy for decades.

Petitioners Kelley Omega ("Kelley") and ATS Omega ("ATS") were distributors of Gilbarco retail dispensers under written distribution agreements with Gilbarco. The agreements, like all of Gilbarco's distributor contracts, had an initial term of one year, after which Gilbarco and the distributors each had the contractual right to terminate the agreements upon 60 days notice.

In 1993 and 1994, Petitioner Omega Environmental, Inc. ("Omega") acquired Kelley and ATS. At the time, Omega also owned other distributors that carried retail dispensers of Gilbarco's competitors on a full-time basis. Omega advised Gilbarco that it intended to have its distributors, including Kelley and ATS, offer both Gilbarco dispensers and competing dispensers. *See* Pet. App. A5. Unwilling to change its long-standing exclusive distributor policy, Gilbarco exercised its contractual right to discontinue its relationships with Kelley and ATS.[5]

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4. It is undisputed, however, that Gilbarco's policy does not prevent its distributors from selling any competing brands of dispensers at the end-user's request. *See* Pet. App. A18-A19. (ER 587, 679, 919).

5. Petitioners seriously mischaracterize the evidence concerning Gilbarco's decision to terminate those relationships. *See* Petition for Certiorari ("Pet.") 4-6. The district court correctly described that evidence in holding that Petitioners' Sherman Act conspiracy claims were unsupported as a matter of law. *See* App., *infra*, 3a-7a.

Terminating the Kelley and ATS distribution agreements had no impact on competition in any relevant market. Uncontroverted trial evidence showed, and Petitioners conceded, that competition among distributors (such as Kelley and ATS) remained intense through the time of trial.[6] Competition between manufacturers was also intense.[7] In order to help Gilbarco's distributors meet competition from other manufacturers and their distributors, Gilbarco negotiated discounts to its distributors on a daily basis. Those discounts, which affected roughly 75% of all Gilbarco sales to distributors, averaged 10% of the wholesale list price.[8] In addition to these daily discounts, Gilbarco actually *lowered* the wholesale list prices of its dispensers during the five-year period immediately before the trial — notwithstanding rising prices in the national economy.[9] At the same time, in order to satisfy increasing demand for retail dispensers, Gilbarco increased its output by roughly 100%.[10] Other manufacturers also increased output[11] and cut prices during this five-year period.[12] *See* App., *infra*, 20a-21a.

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6. *See* Pet. App. A4; App., *infra*, 9a. (ER 779-80, 936-38).

7. *See* Pet. App. A17 (U.S. dispenser market characterized by "increasing output, decreasing prices and significantly fluctuating market shares.")

8. *See* Pet. App. A4. (SER 549, 761; CER 375).

9. *See* Pet. App. A17; App., *infra*, 21a. (CER 879; ER 914-15).

10. *See* Pet. App. A17; App., *infra*, 20a-21a.

11. (SER 558-59, 582; ER 782; CER 690).

12. (CER 316, 695-99: ER 782).

The relative market shares of the five manufacturers fluctuate significantly. During the period 1991 through 1995, Gilbarco increased its market share from 36% to more than 50%.[13] The newest entrant in the United States dispenser industry — Schlumberger, a major European manufacturer of retail dispensers — also increased its market share by at least one-third (from roughly 6% to at least 8%) during that time. *See* Pet. App. A16. Schlumberger slashed prices dramatically following its 1991 entry into the United States market.[14] The other dispenser manufacturers lost market share during this period.[15]

## II. Proceedings in the Trial Court

Kelley, ATS and Omega sued Gilbarco and several Gilbarco distributors. Petitioners claimed, among other things, that Gilbarco's exclusive distributor policy violated section 1 of the Sherman Act, 15 U.S.C. § 1, and section 3 of the Clayton Act, 15 U.S.C. § 14.[16] For purposes of antitrust analysis, Petitioners defined the relevant market as "the sale of retail gasoline dispensers from manufacturers in the United States."[17]

The district court granted summary judgment for defendants on the Sherman Act exclusive dealing claims. App., *infra*, 8a-

13. (ER 843-44).

14. (CER 695, 699; ER 839).

15. (ER 624, 843-44, 909-10; CER 384-85).

16. Petitioners also asserted claims of concerted refusal to deal under Sherman Act section 1, 15 U.S.C. § 1; attempt and conspiracy to monopolize under Sherman Act section 2, 15 U.S.C. § 2; Washington state antitrust law; and state common law.

17. *See* Pet. App. A10. (ER 759-60).

17a. Applying the antitrust "rule of reason," (*Id.* 14a-15a), the court held that Petitioners had submitted no evidence that market prices were above competitive levels because of Gilbarco's policy. Petitioners thus could not establish that Gilbarco's policy — or the termination of Gilbarco's agreements with ATS and Kelley — had actually caused any harm to competition. *Id.* 15a-17a; *see also id.* 19a-23a (concluding that Petitioners' claim that Gilbarco possessed power to restrict output or raise prices in the relevant market "is not supported by any evidence . . . economic theory or case law").[18] Absent such harm, Gilbarco was entitled to judgment as a matter of law on Petitioners' Sherman Act exclusive dealing claims. App., *infra* 17a.[19]

The district court denied Gilbarco's motion for summary judgment on their similar Clayton Act exclusive dealing claim. *Id.* 25a-28a. The court held that the Clayton Act — unlike the Sherman Act — did not require Petitioners to prove actual competitive injury, but only that Gilbarco's policy threatened an "incipien[t]" or "probable" lessening of competition. *Id.* 27a (citation omitted). Even though Petitioners could not show actual injury to competition, the court held that they might be able to establish that Gilbarco's decades-old policy threatened

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18. The district court also concluded that the Petitioners' expert's report did not provide any credible evidence with respect to supracompetitive prices or the ability of Gilbarco to limit output of others . . . much of what he [Petitioners' expert] has said about supracompetitive prices was based on whole cloth and had no merit whatsoever. (ER 228-29).

19. Furthermore, the court held, Petitioners' evidence was insufficient as a matter of law to show that Gilbarco had entered any conspiracy, or engaged in any concerted action, as required for liability under Sherman Act section 1. *Id.* 8a-14a. The court also granted Gilbarco summary judgment on Petitioners' claims of attempted monopolization and conspiracy to monopolize under Sherman Act section 2 and the Washington antitrust statute. *Id.* 18a-25a.

"probable" competitive harm under the lenient "incipiency" standard.[20]

The Clayton Act claims proceeded to trial. At the close of Petitioners' case, and again at the end of trial, Gilbarco moved for judgment as a matter of law.[21] The court denied those motions and submitted the case to the jury. In so doing, the district court refused Gilbarco's request to charge the jury that Petitioners had to prove actual harm to competition in order to establish "antitrust injury" to Petitioners, as required in a private civil damages action under Clayton Act section 4, 15 U.S.C. § 15.[22] Instead, the court instructed the jury to impose liability if it found that the "effect" of Gilbarco's policy "may be" to substantially lessen competition in the relevant market.[23] The jury rendered a general verdict against Gilbarco on the Clayton Act exclusive dealing claims.[24] Because the jury instructions did not require any finding of actual harm to competition, the jury made no such finding. Petitioners are simply wrong in asserting otherwise. Pet. 2.

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20. The court also denied Gilbarco summary judgment on Petitioners' exclusive dealing claims under the corresponding provision of Washington's antitrust statute. *See* App., *infra*, 2a. The court granted Gilbarco summary judgment as to some of the state common law claims but denied summary judgment on other common law claims. *See id.* 28a-35a.

21. Gilbarco challenged the sufficiency of the evidence concerning substantial foreclosure of competitors from the relevant market; the likelihood of harm to competition; antitrust injury in the absence of any actual harm to competition; Omega's standing to claim damages for injuries suffered by Kelley or ATS; and the amount of damages.

22. (ER 462-64).

23. (ER 508-09).

24. The jury also ruled for Petitioners on the remaining Washington antitrust law and state common law claims.

The jury awarded each Petitioner damages that, in the aggregate, amounted to $9 million. The district court trebled the jury's damage awards to $27 million, and added attorney fees and costs in excess of $1 million. The district court denied Gilbarco's renewed motion for judgment as a matter of law. Pet. App. B1.[25]

**III. Proceedings on Appeal**

The court of appeals reversed the Clayton Act judgment against Gilbarco (Pet. App. A8-A17) and affirmed the Sherman Act judgment in Gilbarco's favor. *Id.* A22-A24. Judge Pregerson dissented from the Clayton Act reversal. Pet. App. A24-57.

The majority first held, as all parties agree (*see* Pet. 16), that *Tampa Electric* delineates the correct standard for liability under section 3 of the Clayton Act — "the antitrust rule of reason." Pet. App. A9. Under *Tampa Electric*'s rule of reason, the court held,

> [o]nly those arrangements whose "probable" effect is to "foreclose competition in a substantial share of the line of commerce affected" violate Section 3. *Tampa Elec.*, 365 U.S. at 327; *see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring) ("Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.").

*Id.* A10.

25. The district court also entered judgment against Gilbarco on some of Petitioners' state law claims. The court of appeals reversed that judgment, holding Petitioners' evidence deficient as a matter of state law. Pet. App. A17-A22. The Petition does not seek review of that holding.

Applying the *Tampa Electric* rule of reason standard to the undisputed evidence in this case, and construing the evidence in Petitioners' favor, the court of appeals observed that a jury could reasonably find that Gilbarco's policy had "foreclosed" 38% of sales in the relevant market. *Id.* A11. For several reasons, however, the court held that this "purely quantitative" finding considerably overstates the size of the foreclosure and its likely anticompetitive effect. *Id.*

First, the court concluded that "[t]he record contains undisputed evidence" that Gilbarco's competitors have several alternative ways to get their retail dispensers to end-users without using Gilbarco's exclusive distributors. Pet. App. A12-A13. For example, existing companies that regularly service and sell other kinds of fuel dispensing equipment — such as filling station canopies, storage tanks, pumps, hoses and nozzles[26] — are available to become distributors of retail gasoline dispensers. *Id.* A12. Indeed, ATS and Kelley were service contractors before becoming distributors of retail dispensers. *Id.* Moreover, large end-users buy substantial quantities of retail dispensers directly from the factories, bypassing distributors altogether.

> Gilbarco, Dresser Wayne, Tokheim, Schlumberger and Bennett respectively make 30%, 73%, 35%, 15%, and 15% of their sales without the aid of distributors.

*Id.* These two alternative methods of distributing retail dispensers "eliminate substantially any foreclosure effect Gilbarco's policy might have." *Id.* A13.

Second, the court noted that either party may terminate a Gilbarco distributorship contract without cause and without

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26. (SER 382; ER 622).

penalty upon 60 days notice after the first year of the contract. Thus, the court explained,

> [b]ecause *all* of Gilbarco's distributors are available within one year, and *most* (90% according to plaintiffs) are available on 60 days notice, a competing manufacturer need only offer a better product or a better deal to acquire their services.

Pet. App. A14 (emphasis in original). The court held that "the short duration and easy terminability of [Gilbarco's] agreements negate substantially their potential to foreclose competition." *Id.*; *see also id.* A16.

Furthermore, Petitioners had submitted no credible evidence (only "admitted speculation" by an Omega officer) to show that Gilbarco's policy had *actually* deterred anyone from entering into the United States retail dispenser market. *Id.* A15 & n.7. Indeed, "the actual entry and expansion of Schlumberger," a competing manufacturer from Europe, "demonstrate the contrary." *Id.* A15-A16.[27] Schlumberger expanded its "weak distribution system" (Pet. 29) to more than 100 firms with "proven finances, abilities and customer relationships." Pet. App. A16. Schlumberger's successful entry and expansion, the court of appeals held, "precludes a finding that exclusive dealing is an entry barrier of any significance." *Id.*

The court of appeals further noted that the record contained "undisputed evidence" of vigorous competition among retail dispenser manufacturers: "increasing output, decreasing prices,

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27. Schlumberger entered the market in 1991 by acquiring Southwest Pump, an insignificant United States manufacturer. *See generally* 5 Phillip Areeda & Donald Turner, *Antitrust Law* ¶¶ 1124-25 (1980) (acquisition of a small industry participant with subsequent expansion of output is equivalent to new entry).

and significantly fluctuating market shares." *Id.* A17. Citing *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993), the Court held that the evidence was insufficient to permit a reasonable jury inference of "probable" injury to competition in the retail dispenser market. Pet. App. A17. Thus, viewed in the light most favorable to Petitioners, the evidence did not support the verdict.

The Ninth Circuit then addressed and rejected Petitioners' cross-appeal of the district court's dismissal of the Sherman Act claims. Pet. App. A22-A24.[28] Having found no violation of the antitrust laws, the court did not address Gilbarco's challenges to the jury instructions regarding antitrust injury and to the sufficiency of the evidence concerning antitrust injury, standing, or damages.

The court denied Petitioners' request for rehearing and en banc consideration. Pet. App. C3.

## REASONS FOR DENYING THE WRIT

The court of appeals applied the rule of reason, settled antitrust principles and the pertinent decisions of this Court to the facts of this case. The court of appeals held that, as a matter of law, the objective, competitive facts in the retail dispenser industry preclude a reasonable inference that Gilbarco's exclusive distributor policy substantially foreclosed competitors or threatened to injure competition. That fact-specific analysis was entirely correct, concerns only the circumstances of distribution in the United States retail gasoline dispenser industry, and is not of any general significance. Nothing in the appellate opinion supports Petitioners' argument that the decision created rules of "per se legality" or irrebuttable presumptions of lawfulness. There is, therefore, no reason for further review by this Court.

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28. The Petition does not seek review of that holding.

## I. The Court Of Appeals Properly Applied The *Tampa Electric* Rule Of Reason To These Undisputed Facts.

In concluding that Petitioners' evidence was not legally sufficient, the court of appeals applied the very same standard from *Tampa Electric* that Petitioners rely upon here. Exclusive dealing is unlawful under Clayton Act section 3 only when "the opportunities for other traders to enter into or remain in that market [are] . . . significantly limited." *Tampa Elec.*, 365 U.S. at 328 (quoted in Pet. 16); *see also Jefferson Parish*, 466 U.S. at 45 (concurring op.). Here, without significant limitation, rival manufacturers competed — and one new entrant expanded — in the United States market for retail dispensers. As undisputed evidence shows, competitors do not need access to Gilbarco's distributors in order to compete vigorously and successfully.

> Competitors are free to sell directly, to develop alternative distributors, or to compete for the services of the existing distributors. Antitrust laws require no more.

Pet. App. A13.[29] The Ninth Circuit correctly observed that, because a manufacturer's exclusive distributorship arrangements may permit rivals to employ alternative distribution methods, "exclusive dealing arrangements imposed on distributors rather than end-users are generally less cause for concern." *Id.* A11 (citing Eighth Circuit precedent and respected academic commentators).

Petitioners contend that the court of appeals' reliance on the undisputed evidence in this case conflicts with *Standard*

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29. Petitioners now suggest that the facts relied upon by the Ninth Circuit were disputed. (Pet. 9). Petitioners waived that argument by failing to dispute those facts in the court of appeals. Instead, Petitioners incorrectly argued that other purported facts supported the jury verdict.

*Oil Co. v. United States*, 337 U.S. 293 (1949) [hereinafter *Standard Stations*], where the Court imposed liability under section 3 of the Clayton Act "despite extant alternate channels of distribution . . . accounting for 16.3% of the total market." Pet. 23 n.16. In *Standard Stations*, the Court reviewed a decade (1937-1946) during which very stable market shares suggested that the industrywide exclusive arrangements "enable the established suppliers individually to maintain their own standing and at the same time . . . prevent a late arrival from" significant entry. *See* 337 U.S. at 309. Here, in contrast, direct sales account for more than one-third of sales in the market; 500-600 potential alternative distributors also are available; and market shares were far from stable. During 1986-1995, market shares among dispenser manufacturers varied widely, while a new competitor — Schlumberger — entered the market and became one of the major competitors. *Cf. Tampa Elec.*, 365 U.S. at 328.[30] Such fluctuations in market share indicate vigorous competition. *See United States v. Syufy Enters.*, 903 F.2d 659, 665-66 (9th Cir. 1990). The Ninth Circuit's decision here does not conflict with *Standard Stations*.[31]

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30. Petitioners also contend that two foreign manufacturers — Koppens and Tatsuno — "attempted and failed to enter the United States because they could not obtain or create distributors." Pet. 4 (quoting Pet. App. A27 (Pregerson, J., dissenting)). As support for that contention, Petitioners cite only the dissenting opinion, which in turn cited no evidence to warrant a reasonable jury finding in Petitioners' favor. No such evidence exists. The majority considered that unsupported factual contention and properly rejected it as a matter of law. Pet. App. A15 & n.7. (ER 737, 771, 931-32; CER 307).

31. The court of appeals decision likewise does not conflict with *Fashion Originators Guild of America v. FTC*, 312 U.S. 457 (1941), as Petitioners contend. *See* Pet. 24. The defendants in that case — unlike Gilbarco — had "sufficient control and power . . . 'to exclude from the industry' " rival manufacturers and distributors. 312 U.S. at 466. *See also* App. *infra* 20a-23a.

## II. The Court Of Appeals Properly Held That The 60-day Contractual Termination Provision, Under The Facts Of *This* Case, Substantially Negates Any Potential Foreclosure Of Competition.

The Ninth Circuit also relied on the fact that Gilbarco's distributors are free to terminate their exclusive distributorships, without cause or penalty, upon 60 days notice after the first year of the contract. Because "a competing manufacturer need only offer a better product or a better deal" to recruit Gilbarco's distributors, "the short duration and easy terminability of those agreements negate substantially their potential to foreclose competition". Pet. App. A14 (citations omitted); *see also id.* A16 (citation omitted). That holding properly applies the *Tampa Electric* rule of reason, and is in harmony with settled precedent from other circuits.[32] The court's conclusion does not warrant certiorari.

Petitioners do not — and cannot — cite any evidence suggesting that Gilbarco's rivals lacked the resources or ability to offer distributors "a better product or a better deal." Petitioners called none of those competitors as witnesses at trial. Indeed, Petitioners' expert conceded that the lack of additional market entrants may be due to the fact that industry profit levels are *too low* to attract new manufacturers.[33] Moreover, the ready

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32. In addition to the authorities cited by the court, *see also Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253, 1258 & n.18 (5th Cir. 1988) (affirming directed verdict where no distributors agreed to refrain from selling a competitor's products for any specified period of time); *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 412 (5th Cir. 1962) (exclusive contract terminable on six months notice lawful).

33. (SER 524). The prevalence of low prices, and hence low profits, is not a "barrier" to entry. *See Syufy Enters.*, 903 F.2d at 668-69. Because undisputed evidence shows that the prices of retail dispensers were not (Cont'd)

availability of alternative sales and service firms to become distributors of retail dispensers made it unnecessary for rivals like Schlumberger to recruit Gilbarco's distributors.[34]

## III. The Court Of Appeals Correctly Held That The Undisputed Facts Preclude A Finding Of Likely Harm To Competition.

Section 3 imposes liability only if "the effect" of an exclusive dealing arrangement "may be to substantially lessen competition or tend to create a monopoly. . . ." 15 U.S.C. § 14. Petitioners therefore had to prove that exclusive distributor arrangements would likely cause (a) higher prices; (b) reduced output; or (c) some other harm to competition. *See Roland Mach. Co. v. Dresser Indus. Inc.*, 749 F.2d 380, 394-95 (7th Cir. 1984). Petitioners do not contend otherwise. *See* Pet. 25-26. The court of appeals correctly observed that undisputed evidence in this case shows exactly the opposite: "increasing output, decreasing prices, and significantly fluctuating market shares among the major manufacturers." Pet. App. A17 (citing *Brooke*, 509 U.S. 209). In holding that the these facts preclude a reasonable finding of likely harm to competition, the Ninth Circuit properly followed the guidelines established in *Brooke* for assessing

(Cont'd)
supracompetitive (*see infra*, III), there is no reason to speculate that Gilbarco might have shared any supracompetitive returns with its distributors in order to persuade them not to exercise their contractual termination rights. *Cf.* A. Douglas Melamed, *Exclusionary Vertical Agreements*, Remarks Before ABA Antitrust Section, 5, 9-10 (April 2, 1998) (proposing criteria for guiding prosecutorial discretion in exclusive dealing cases) (cited in Pet. 28-29 n.23). It is undisputed that distributors of retail dispensers — including Gilbarco's distributors — earn only meager returns. (ER 617; SER 755-56).

34. Not surprisingly, therefore, Petitioners' expert conceded that barriers to entry into the United States market for retail dispensers are not "major." (ER 773-74).

whether a reasonable jury could find that a practice is "likely to result in oligopolistic price coordination and sustained supracompetitive pricing." 509 U.S. at 243.

*Brooke* explained that supracompetitive pricing "entails a restriction in output." *Id.* at 233. When output actually rises, a Clayton Act plaintiff seeking to avoid judgment as a matter of law must provide "concrete evidence" that output rose at a "slower" rate due to the defendant's allegedly anticompetitive conduct. *Id.* at 234.[35] Because Petitioners did not point to any concrete evidence that output would have risen faster in this market absent exclusive distribution of retail dispensers, the Ninth Circuit properly held that no reasonable jury could infer "probable" harm to competition under *Brooke*. Pet. App. A17.

Petitioners contend that the court of appeals "ignored the substantial evidence" that prices for retail dispensers were higher than they ought to have been in a "competitive" market due to oligopolistic coordination between manufacturers. Pet. 26 & n.21; *see also id.* 15 & n.7. No evidence whatsoever supports that assertion. *See generally Brooke*, 509 U.S. at 238-39. Unable to cite any evidence of actual supracompetitive prices, or diminished output, Petitioners rely upon evidence that purportedly shows Gilbarco "feared" a further decline of prices as a result of pressure from non-exclusive distributors. Pet. 26.[36] Such a *subjective* concern is clearly not sufficient to satisfy *Brooke*, where the Court required concrete "objective" evidence showing that prices were supracompetitive. 509 U.S. at 241 (rejecting Clayton Act liability based on defendants' "desire"

35. The Court requires such "concrete evidence" of restricted output notwithstanding other evidence that the market is highly concentrated or characterized by rising prices. *See id.* at 213, 230, 237.

36. Nothing in the record excerpts cited in the Petition supports the contention that Gilbarco had such a fear. (*See* CSER 110-12).

for higher prices). Moreover, Petitioners' effort to infer supracompetitive pricing from the roughly constant level of Gilbarco's profit margins (Pet. 26-27 & n.21)[37] is belied by the testimony of their own expert that Gilbarco is more efficient that its rivals. Settled precedent holds that the profit levels of a single, efficient firm provide no basis for inferring supracompetitive prices.[38] Indeed, the Court in *Brooke* refused to permit a jury inference of supracompetitive pricing based upon testimony that profit margins actually *grew*. *See* 509 U.S. at 235 ("price increases outpaced increases in costs").[39]

The Questions Presented by Petitioners concede that output of retail dispensers increased to "reflect" new demand. Pet. i.

37. Gilbarco's profit margin in fact fell over the period 1991-1995. (CER 894).

38. *E.g.*, *Concord v. Boston Edison Co.*, 915 F.2d 17, 30 (1st Cir. 1990) (Breyer, C.J.); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir.), *cert. denied*, 118 S. Ct. 559 (1997).

Nothing in *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1178 (1998), cited by Petitioners (Pet. 25), suggests that the facts of this case warrant a finding of likely harm to competition. *Prescription Drugs* holds only that a jury could infer an agreement — unlawful under Sherman Act section 1 — between wholesalers and manufacturers to fix the prices that end-user customers pay, where the evidence suggests that distributors had a rational economic motive for agreeing to such a scheme despite a possible reduction in their selling volume due to higher prices. 123 F.3d at 614.

39. Without explaining its relevance for their Questions Presented, Petitioners also assert that exclusive dealing has raised the cost to consumers of gathering information about prices. *See* Pet. 5-6. No evidence supports the opinion of Petitioners' expert witness to that effect. Indeed, he testified that information regarding prices gets out to customers "readily and rapidly" despite exclusive distribution in the retail dispenser industry. (CSER 151; *see also* ER 586).

Because supracompetitive pricing entails a *restriction* of output, *variations* in output to meet customer demand show that the market is "functioning in a competitive manner." *Brooke*, 509 U.S. at 233. *See NCAA v. Board of Regents*, 468 U.S. 85, 107 (1984) (a market functions noncompetitively only when producers are unresponsive to customer demand).[40]

Petitioners have presented no reason for the Court to retrace its "demanding" analysis, 509 U.S. at 243, of similar competitive facts in *Brooke*. Petitioners actually never asserted at trial that prices for retail dispensers were above competitive levels or were likely to become supracompetitive in the future.[41] Petitioners expert witness offered no such opinion at trial.[42] Before trial, the district court concluded that Petitioners' theories of supracompetitive pricing "are not supported by any credible evidence", App., *infra* 17a, and Petitioners never raised those theories again until the appeal. The Court should not review Petitioners' factual assertions now.

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40. Petitioners also concede that, in the United States market for retail dispensers, exclusive distribution has continued for decades, "independent of fluctuations in output, price, or share in response to immediate market events." Pet. 24 n.17. Petitioners point to no evidence that the effect of exclusive distribution will probably change in the future.

41. *See Han v. United States*, 944 F.2d 526, 527 n.1 (9th Cir. 1991) (Ninth Circuit generally does not address arguments that were abandoned in the district court).

42. The expert conceded at trial that "there is competition in this industry" ("I've never denied that") and that manufacturers face price pressure "everyday." (SER 549, 767). Rather, he theorized that exclusive distribution "increased" the "risk of lessened price pressure"; and that price competition would be "more intense" if there were no exclusive dealing. (ER 766, 776-77).

## IV. The Court Of Appeals Created No Per Se Rules Of Antitrust Legality.

The foregoing holdings of the court of appeals entailed a straightforward statement of the controlling rule of law. The court then applied the law to the undisputed facts that the court determined the record establishes. In an effort to suggest that the decision below warrants this Court's review, despite its entirely factbound character, Petitioners contend that the court of appeals has created "a category of per se legality" (Pet. 13), that it has utilized "unrebuttable presumptions" (*id.* 12), and that it has created a "[j]udicial exception[ ]" to the Clayton Act for exclusive dealing arrangements with distributors (*id.*).[43] These incorrect characterizations are entirely without substance. Rather than applying any rigid or per se rules, presumptions or exceptions — those words do not appear in the Clayton Act portion of the court's opinion — the court of appeals explicitly stated that "[w]e . . . analyze challenges to exclusive dealing arrangements under the anti-trust rule of reason." Pet. App. A9.

Petitioners say, however, the Ninth Circuit relied on a mere "theoretical[ ]" possibility that competing manufacturers could sell directly to end-users, without needing to use Gilbarco distributors to make such sales. Pet. 11; *see id.* 18-19. The Ninth Circuit decidedly did *not* rely on a mere "theoretical[ ]" "possibility" of direct sales by Gilbarco competitors. Instead, the court relied on undisputed *evidence* that retail dispenser manufacturers *in fact* made a very large portion of their sales without the aid of any distributors. Pet. App. A12.[44] In addition,

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43. Such presumptions purportedly conflict with the holding of *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 466-67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law").

44. Petitioners assert that making direct sales to end-users is more costly than selling through distributors and that such additional costs could be high

(Cont'd)

the court relied on undisputed *evidence* showing that new entrants like Schlumberger can and do recruit distributors from existing service and sales companies. *Id.*[45] The Ninth Circuit's rigorous analysis of "[t]his undisputed evidence," *id.*, extends no farther than the facts and parties in this case.

Petitioners further contend that the Ninth Circuit created a new legal "presumption" by holding that exclusive arrangements involving intermediary dealers are subject to a more demanding burden of proof of likely harm to competition than the burden required in challenges to exclusive dealing restraints upon end-users. *See* Pet. 20. The Ninth Circuit created no such presumption, and did not raise the standard of proof. Instead, the court observed that "exclusive dealing restraints imposed on distributors rather than end-users are generally less cause for concern." Pet. App. A11. The court also recognized that the Eighth Circuit "require[d] a higher standard of proof of 'substantial foreclosure' " in exclusive dealing cases involving dealers rather than end-users. *See Ryko Manufacturing Co. v. Eden Services*, 823 F.2d at 1215, 1235 (8th Cir. 1987). The Ninth Circuit neither adopted nor rejected that sister-circuit holding.[46] Rather, the court held Petitioners' proof deficient

(Cont'd)
enough to deter entry. *See* Pet. 22 n.15. The Ninth Circuit properly did not address that argument because Petitioners cited no factual evidence — and none exists — suggesting that the costs of making such direct sales of retail dispensers are sufficiently high to deter entry.

45. For example, ATS and Kelley were not distributors of retail dispensers before they joined the Gilbarco distributor network. Pet. App. A12. The number of service companies that are not yet distributors is substantial. Petitioner Omega's CEO conceded that well over 1,000 firms compete for sales and service to retail service stations. (SER 382).

46. Neither did the Ninth Circuit create any legal presumption by recognizing (Pet. App. A13) that in *Seagood Trading Corp. v. Jerrico, Inc.*,
(Cont'd)

under *Tampa Electric* because the undisputed evidence showed that there was *no* anticompetitive foreclosure. Gilbarco's competitors in the retail dispenser market in fact can and do "reach the ultimate consumers of the product" without using Gilbarco distributors. Pet. App. A11.[47]

Petitioners also contend that the majority incorrectly "ignore[d]" the fact "that here, in reality, the contractual right to terminate on sixty days notice . . . 'means little.' " Pet. 28 (quoting Pet. App. A54 (Pregerson, J., dissenting)). That purported "reality" was so clear, Petitioners contend, that the Ninth Circuit could have disregarded it "[o]nly by creating a legal presumption". Pet. 28. Petitioners' speculative inference that the court created a presumption provides no grounds for review. The Ninth Circuit only evaluated the record in a manner that Petitioners disagree with. That evaluation does not warrant revisiting by this Court. *See* S. Ct. R. 10.

Moreover, the Ninth Circuit did not "ignore" Petitioners' contention that the 60-day termination right is illusory because no distributor would abandon the Gilbarco line for an unproven new product. *See* Pet. 27-29 & n.22.[48] Actually, the majority

(Cont'd)
924 F.2d 1555, 1573 (11th Cir. 1991), the Eleventh Circuit found no anticompetitive impact from an alleged refusal to deal, where plaintiffs were not foreclosed from "every" alternative provider of the services at issue in that case. The available supply of those alternative services in *Seagood* was — as in this case — "enormous." 924 F.2d at 1573.

47. *Accord Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1383 (5th Cir. 1994) (reaching the same conclusion in a tying case), *cert. denied*, 513 U.S. 1103 (1995).

48. The record is clear that Gilbarco distributors incur no penalty for exercising their contractual termination rights. *See* Pet. App. A5. In fact, distributors do switch between manufacturers. (SER 340; ER 610-11).

"agree[d] with the unremarkable proposition that a competitor with a proven product and a strong reputation" enjoys a competitive advantage — this "is the essence of competition." Pet. App. A15. Gilbarco's reputation for superior products is not a legally relevant deterrent to another manufacturer recruiting Gilbarco distributors because, as the Ninth Circuit correctly held, rivals "need only offer a better product or a better deal" to entice Gilbarco distributors to exercise their termination rights. *Id.* A14. That holding embodies no new rule of law. *See Roland*, 749 F.2d at 394 (finding no likelihood of plaintiff successfully establishing Clayton Act liability where a new entrant "has only to offer a better deal to some other manufacturer's dealer").[49]

Finally, Petitioners assert that the Ninth Circuit's holding that Petitioners offered insufficient evidence of likely harm to competition somehow "immunizes" all vertical restraints in markets where prices are falling and output is rising. Pet. 23. The court's assessment of the record extends no farther than the facts of this case. The court properly applied *Brooke* to that record, and in doing so created no legal immunity.

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49. Petitioners hint that Judge Posner, the author of *Roland*, is a partisan for the view that certain restraints should be legal per se. *See* Pet. 12 (citing Richard Posner, *The Next Step in the Antitrust Treatment of Restrictive Distribution: Per Se Legality*, 48 Chi. L. Rev. 1 (1991)). Nothing in *Roland* or the Ninth Circuit's opinion here suggests such a rule.

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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# APPENDIX

## APPENDIX

## ORDER [GRANTING IN PART AND DENYING IN PART GILBARCO'S MOTION FOR SUMMARY JUDGMENT]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C94-887Z

OMEGA ENVIRONMENTAL, INC., et al.,

Plaintiffs,

v.

GILBARCO, INC., et al.,

Defendants.

ORDER

THIS MATTER comes before the Court on defendants' motions for summary judgment, docket nos. 215, 217, 228, and 230. The Court heard oral argument on October 26, 1995, and took the matter under advisement.[1] The Court, having reviewed the pleadings in support of and in opposition to these motions, now GRANTS the motions of RPE, Waldock and SME and dismisses all remaining claims against these defendants. The Court further GRANTS in part and DENIES in part Gilbarco's motion to dismiss all of plaintiffs' claims. The Court GRANTS Gilbarco's motion to dismiss plaintiffs' claims based on Sections 1 and 2 of

1. The Court entered a Minute Order on November 8, 1995, (docket no. 306) deciding these motions. This Order provides the reasoning for the Court's decision.

the Sherman Act and corresponding state law, RCW 19.86.030-040. The Court DENIES Gilbarco's motion to dismiss the remaining claims under Section 3 of the Clayton Act and its state law counterpart, RCW 19.86.050 (third cause of action), unfair competition under RCW 19.86.020 (fifth cause of action), breach of contract (sixth cause of action), interference with business relationships (seventh cause of action), and misrepresentation (ninth cause of action). Only these claims against Gilbarco will proceed to trial.[2]

## BACKGROUND

This Order incorporates by reference the background and history of this litigation contained in the Court's previous Order dated February 1, 1995, docket no. 63. Subsequent to that Order, plaintiffs filed a Second Amended Complaint, docket no. 146. This Court has previously dismissed the eighth cause of action by Omega against all defendants for defamation. Plaintiffs continue to seek recovery against the defendants for various remaining violations of federal and state law.

ATS Omega ("ATS") and Kelley Omega ("Kelley") are wholly owned but separately-managed subsidiaries of plaintiff Omega Environmental, Inc. ("Omega"). All three plaintiffs provide, install, and service tanks, petroleum dispensers, and all equipment for service stations and other petroleum marketers. Defendant Gilbarco, Inc. ("Gilbarco") manufactures and sells petroleum dispensing and related equipment. ATS and Kelley were authorized Gilbarco distributors until their terminations by Gilbarco. Defendant Rochester Petroleum ("RPE") and SME

2. The Court has previously bifurcated the plaintiffs' fourth cause of action for violation of Section 2(a) of the Robinson-Patman Act and the parties have agreed that this claim will be tried by the court, without a jury, at a later date.

were distributors of Gilbarco and defendant Waldock is the President of SME (collectively the distributor defendants).

Plaintiffs allege against all defendants violations of Sections 1 and 2 of the Sherman Act, corresponding state law violations under RCW 19.86.030 and 040, and a violation of RCW 19.86.020 (collectively the antitrust claims). Plaintiffs' antitrust claims relate to alleged unreasonable restraints of trade and an attempt to monopolize the manufacture of retail fuel dispensers in the United States. Plaintiffs also allege interference with business relationships against all defendants.

Plaintiffs bring certain claims only against Gilbarco. Plaintiffs allege that Gilbarco violated Section 3 of the Clayton Act, 15 U.S.C. § 14, and its state law counterpart. In addition, plaintiffs allege claims for breach of contract and misrepresentation against Gilbarco.

The movants were directed by the Court to file statements of facts without dispute in support of their various motions for summary judgment. The opposing party was required to file responses to the statements of facts. The non-Gilbarco defendants rely on their statement of undisputed facts, docket no. 216 ("S.F."), in support of their summary judgment motions. Plaintiffs have responded and dispute certain facts, docket no. 240. Gilbarco relies on its statement of material facts, docket no. 219 ("G.S.F."), which plaintiffs have responded to and disputed, docket no. 239. Although plaintiffs dispute various facts, the Court concludes, based on the undisputed facts contained in the plaintiffs' responses, and giving all inferences in favor of the plaintiffs that partial summary judgment is appropriate as set forth in this Order.

In substance, plaintiffs contend that Jerry Asmussen (President of RPE) spoke with defendant Waldock at a trade

show in Salt Lake City and asked him what he knew about Omega. S.F. 7. Asmussen was at that time chairperson of the Distributor Advisory Council ("DAC"). Waldock was familiar with Omega and expressed concerns about Omega's competition and efforts to lower prices. S.F. 8; S.F. 9. Asmussen asked Waldock to write a letter concerning Omega. This letter, dated December 3, 1993, was sent to Asmussen (S.F. 21) ("the Letter"). The parties dispute whether Waldock sent the Letter to Asmussen personally or as Chairman of the DAC. S.F. 11.

In the late fall of 1993, Gilbarco itself was beginning to analyze Omega, a company which had purchased a Gilbarco distributor and might be buying others. S.F. 13. Gilbarco learned that Omega had agreed to buy Kelley and was negotiating with other companies. During this same pre-December, 1993 time frame, Gilbarco's eastern regional sales manager, Donald Borzilleri, told Gilbarco's senior marketing analyst, Peter Lux, that Omega represented a significant change in the way petroleum equipment was distributed and that Omega's proposed method of distribution represented "an issue of significant importance." S.F. 14. In early December, Gilbarco representatives had internal meetings and also met with Omega representatives. The distributor defendants did not participate. S.F. 16, 17, 18.

On December 14 and 15, a meeting occurred in Chicago between Gilbarco representatives and the Gilbarco Distributor Advisory Council ("DAC"). Asmussen depo. at 203. The participants discussed Omega and Waldock's letter of December 3 was read to the participants by Mr. Asmussen. *Id.* at 214, 240. The last paragraph of Mr. Waldock's letter stated, "I feel that a Gilbarco distributor purchased by Omega should be canceled immediately." This was Asmussen's only publication of the Letter other than the possibility that he read it over the telephone to Mr.

Gavin, Gilbarco's general manager of sales. S.F. 13, 26. The Letter refers to price and competition. *See* Letter, Ex. 10 to Asmussen depo.

At the meeting, Gilbarco representatives indicated to the DAC that Gilbarco was considering a policy of terminating any Gilbarco distributor that was purchased by Omega. Asmussen depo. at 210. Mr. Gavin, Gilbarco's general manager of sales, went around the meeting room and asked distributors for their views on Omega. S.F. 31. The DAC representatives expressed their views about whether Gilbarco should do business with companies owned by Omega. Reynolds depo. at 134-5. At least one representative expressed the opinion that Omega would be a threat to the profits of the other distributors and that a policy excluding Omega would have certain advantages on pricing. *Id.* at 135. Mr. Asmussen also expressed his view that Gilbarco should require its distributors to sell only Gilbarco products. Asmussen depo. at 233. Asmussen stated that one could be either a Gilbarco distributor or a Tokheim (or other) distributor, but not both. He reasoned that "the loyalty issue was at question, and as far as I was concerned, there could be no loyalty" if a distributor handled products from both Gilbarco and other manufacturers. *Id.* at 251. He also said he was concerned that it would have an impact on his margins. *Id.* at 235.

Gilbarco did not take any action concerning Omega at the conclusion of the December 15 meeting. G.S.F. 128-29; Asmussen depo. at 265. On the evening of December 15, there was a meeting of Gilbarco and Omega representatives to discuss the just-concluded DAC meeting. None of the distributor defendants participated in this meeting. Plaintiffs point to no involvement by the distributor defendants after the conclusion of the DAC meeting. Thereafter, during the period from late December 1993 until spring

1994, Gilbarco considered the Omega matter. Plaintiffs' response to G.S.F. 163-66. In the course of their consideration of the Omega matter, Gilbarco representatives communicated with other manufacturers Tokheim and Dresser-Wayne. In addition, Peter Frank of Ten Hoeve (another distributor) proposed to Gilbarco the creation of a "super distributorship" to compete with Omega. S.F. 41.

On February 4, 1994, Gilbarco officers met to decide how to proceed with respect to Omega. Snowberger Depo. at 262-63. Sometime thereafter, Gilbarco decided to adopt a policy under which it would terminate any distributor owned or thereafter purchased by Omega. S.F. 39; G.S.F. 165.[3] At that time Kelley was already owned by Omega. Omega purchased ATS on March 31, 1994. Both Kelley and ATS were terminated with at least 60 days' notice. Pretrial order, Admitted Facts ¶¶ 3 and 5.

Many of plaintiffs' claims are based on their allegation that DAC members asked Gilbarco to adopt the policy of termination at the December 15 meeting and "Gilbarco subsequently agreed to this request." S.F. 39 (disputed version). Plaintiffs also contend that the December 3 letter "was instrumental in forming the conspiracy" that supports plaintiffs' claims. S.F. 46, 47 and 49 (disputed version). The undisputed evidence indicates that no decision was made by Gilbarco until approximately two months

3. It is undisputed that Gilbarco sent Reynolds, the president of ATS, a letter on February 8 setting forth a policy of termination. G.S.F. 166. However, the import of that letter is in dispute. Plaintiffs claim in their Response to G.S.F. 165, docket no. 239, that Gilbarco had already established its termination policy prior to the date of this letter. However, in his deposition, Reynolds indicated that the letter did not make the termination policy clear and that when he sold ATS to Omega, on March 31, he still believed that Gilbarco would not terminate the distributorship. Reynolds depot. at 136. Gilbarco sent ATS its 60 days' notice of termination on April 18, 1994. G.S.F. 168.

after the DAC meeting, following internal discussion of the proposed action. Plaintiffs fail to provide the Court with evidence of any material involvement by the distributor defendants in connection with the ultimate decision to terminate plaintiffs.

## ANALYSIS

I. *Summary Judgment Standard*

Summary judgment is proper only when "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This standard requires the absence of any genuine factual issue. While the Court cannot resolve factual disputes at this stage, and must regard the facts in the light most favorable to the nonmoving party, it need not preserve issues for trial if no reasonable juror could find that defendants' conduct was more likely than not illegal.[4] *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. __, 113 S.Ct. 2578, 2595, 125 L.Ed.2d 168, 195 (1993); *Wilcox v. First Interstate Bank, N.A.*, 815 F.2d 522 (9th Cir. 1987); Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law* § 322a at 63-63 (revised ed. 1995).

Further, the Court should credit expert opinion concerning the elements of the claims only insofar as it is "supported by sufficient facts to validate it in the eyes of the law." *Brooke Group*, 113 S.Ct. at 2598, 125 L.Ed.2d at 198, *quoted in Rebel Oil v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995). If an

4. This standard does not convert the judge into a "thirteenth juror." *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation*, 906 F.2d 432, 438 (9th Cir. 1990). The Court will not determine which party's evidence is more convincing. Rather, the Court must determine whether any evidence offered by the plaintiff could convince a rational juror of the existence of illegal conduct.

opinion or declaration is economically unreasonable, it will not defeat summary judgment.

Plaintiffs cite several cases for the proposition that summary judgment is disfavored in antitrust cases. *See, e.g., Poller v. CBS*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). This rule reflects the fact that such cases are often factually complex. It does not preclude summary judgment, but "merely teaches caution." *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680 (9th Cir. 1985).

II. *Antitrust Claims and Related State Claims*

A. *Sherman Act § 1 and RCW 19.86.020*

Plaintiffs allege that defendants conspired to restrain trade in the United States market for retail petroleum dispensers. First, plaintiffs claim that Gilbarco's practice of prohibiting its distributors from carrying competing brands of retail petroleum dispensers (the "exclusive dealing" claim) restrains trade. Plaintiffs' Memorandum in Opposition, docket no. 238 at 2; G.S.F. 25 (no dispute) (describing Gilbarco's exclusive dealing requirement). Because plaintiffs no longer distribute Gilbarco products, their exclusive dealing claim must rest on their allegation that Gilbarco's terminations of ATS and Kelley "served to enforce exclusive dealing." Plaintiffs' Memorandum in Opposition, docket no. 238 at 2. Plaintiffs next claim that Gilbarco's termination of ATS and Kelley and refusal to deal with Omega-owned companies restrain trade. *Id.*

Plaintiffs' claims against the distributor defendants depend upon the allegation that the exclusive dealing practices and terminations were "undertaken in agreement with its [Gilbarco's]

distributors, including co-defendants Rochester Petroleum Equipment and SME and with the tacit agreement that other manufacturers would do the same." Plaintiffs' Memorandum in Opposition to RPE's Motion, docket no. 241 at 2.

Plaintiffs allege that four firms (Gilbarco, Dresser-Wayne, Tokheim and Schlumberger) control 97 percent of the manufacturing market and pursue a variety of strategies to maintain prices and margins above competitive levels.[5] Plaintiffs do not dispute that competition among distributors is healthy. Plaintiffs' Response to G.S.F. 74, docket no. 239. They allege supracompetitive pricing at the retail level as a result of the restraints on distributors' business practices and the refusal to deal with Omega-owned companies. Plaintiffs' Response to G.S.F. 40; Leffler Decl. ¶ 6. This claim does not survive summary judgment because plaintiffs do not present evidence from which a jury could find that defendants conspired or that the restraints at issue were unreasonable.

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides that

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

RCW 19.86.030 contains substantially the same language.

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5. Plaintiffs rely on their economic expert Keith Leffler to provide support for their antitrust claims. See Leffler Declaration and Report, attached to Declaration of S.C. Willey, docket no. 242.

*Appendix*

(1) *Concerted Action*

In order to prove a violation of Section 1, a plaintiff must show concerted action; a Section 1 violation cannot be premised on unilateral action. *Reazin v. Blue Cross & Blue Shield of Kansas*, 899 F.2d 951, 963 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990). Plaintiffs do not present any evidence that the exclusive dealing requirements were the result of a conspiracy. Plaintiffs' conspiracy argument centers instead upon the terminations of ATS and Kelley and Gilbarco's refusal to deal with Omega-owned companies.

On a motion for summary judgment, a defendant can rebut the allegation of conspiracy by presenting "probable evidence" that it acted independently. *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680 (9th Cir. 1985), quoting *ALW, Inc. v. United Air Lines, Inc.*, 510 F.2d 52, 55 (9th Cir. 1975). When conduct accords with valid business justifications and permitting an inference of illegal conduct would deter procompetitive behavior, then summary judgment for the defendant may be appropriate. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation*, 906 F.2d 432, 440 (9th Cir. 1990).

A plaintiff can avoid dismissal of the Section 1 claim by presenting evidence, whether direct or circumstantial, "that tends to exclude the possibility of independent action." *Monsanto v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768, 104 S.Ct. 1464, 1474, 79 L.Ed.2d 775, 788 (1984). Evidence that is "as consistent with permissible competition as with illegal conspiracy" will not defeat summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 1357, 89 L.Ed.2d 538, 553 (1986); *accord Harkins Amusement Enter. v. General Cinema Corp.*, 850 F.2d 477, 483 (9th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989).

*Appendix*

Gilbarco presents plausible business justifications for the action it took. The evidence demonstrates that Gilbarco desired exclusive representation by all distributors, in order to promote brand loyalty and expertise and to avoid free-rider problems. G.S.F. 133-37, 142; Borzilleri depo. at 258; Gavin depo. at 365-68; Lux Depo. at 246-278; Snowberger depo. at 104-18, 247-53. Gilbarco also raised questions regarding Omega's ability to represent Gilbarco products and Omega's viability as a going concern. Gavin depo. at 773-74; G.S.F. 6.

Nothing alleged by plaintiffs approaches the requisite showing of concerted action to rebut defendants' explanation. Plaintiffs contend that the Letter written by Waldock "was instrumental in forming the conspiracy" and that DAC members "asked Gilbarco to adopt a policy" and "Gilbarco subsequently agreed to this request." S.F. 39 (disputed). These contentions do not present direct evidence of concerted action; instead, they invite the Court to deny summary judgment on the basis of an inference that the distributors' complaints convinced Gilbarco to terminate ATS and Kelley for an unlawful reason. The Court declines the invitation.

Distributor complaints and manufacturer termination alone cannot, as a matter of law, support an inference of conspiracy. *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1467 (9th Cir. 1986). Because dealer complaints about rivalry with other dealers are in the normal course of business, "[p]ermitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct," *Monsanto*, 465 U.S. at 763, and "would subject manufacturers to vexatious litigation because every terminated discounting distributor probably could point to complaints made

by his competitors." *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1263 (9th Cir.), *cert. dismissed*, 464 U.S. 956 (1983). Therefore, "something more" must be shown. *Monsanto*, 465 U.S. at 764; *accord Filco*, 709 F.2d at 1264.

That "something more" may be evidence of a causal relationship between the complaints and the terminations or proof of a "conscious commitment to a common scheme." *Monsanto*, 465 U.S. at 764. "A jury may not be permitted to speculate as to cause from a chain of events; the plaintiff must demonstrate adequately a unity of purpose or a common design and understanding, or a meeting of the minds." *Big Apple BMW, Inc. v. BMW of North America*, 974 F.2d 1358, 1364 (3d Cir. 1992) (quotations and citations omitted), *cert. denied*, __ U.S. __, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993); *see also Hairston v. Pacific-10 Conference*, 893 F.Supp. 1495, 1496 (W.D. Wash. 1995) ("[P]laintiffs must come forward with specific facts in support of their conspiracy allegations once a legitimate reason for defendants' conduct has been suggested. This court is not prepared to infer illegal behavior from mere contacts and communications, or the mere opportunity to conspire.") (quotations and citations omitted).

Plaintiffs fail to present any evidence of causation or a common design. The distributor defendants did not assist in enforcing the alleged restraints. *See United States v. Parke, Davis & Co.*, 362 U.S. 29, 43, 80 S.Ct. 503, 4 L.Ed.2d 505, 515 (1960). The DAC meetings are a regular forum for distributors to air their concerns in the normal course of business. Pretrial Order, Admitted Facts ¶ 25; G.S.F. 138. The Admitted Facts state that "[d]istributors of petroleum dispensing equipment routinely express concerns to their suppliers and complain about conduct which they believe adversely impacts their profitability or methods

of doing business." Pretrial Order, Admitted Facts ¶ 27. It also is undisputed that every major supplier of petroleum dispensers also sponsors a distributor advisory program. *Id.* ¶¶ 25-26. A manufacturer and its distributors are expected to communicate regarding marketing strategies. *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1154 (9th Cir. 1988). Further, there is no evidence that Gilbarco's distributors enjoy sufficient bargaining power to coerce Gilbarco into terminating their competitors. If anything, plaintiffs' evidence suggests that the opposite is true.[6]

Plaintiffs' reliance on *United States v. General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966), is misplaced. In *General Motors*, the Court concluded that the joint collaboration of General Motors and its distributors to eliminate discounters from access to the market constituted a per se violation of Section 1 of the Sherman Act. In reaching that result, the Court relied on findings of fact by the trial court that General Motors had: received complaints about the discounters from its dealers; discussed the problem with every dealer in the Los Angeles area and elicited from each a promise not to do business with the discounters; created a joint policing action to enforce the agreements; and forced violators to repurchase cars that they had sold through discounters. These facts compelled the conclusion that defendants had conspired. In contrast, the distributor's complaints here and their requests for Gilbarco to take action fall far short of the proof necessary to establish a conspiracy to restrain trade.

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6. *See* Plaintiffs' Response to G.S.F. 74, docket no. 239 (agreeing that evidence shows that competition among distributors is intense); *id.* at ¶ 75 (disputing Gilbarco's assertion that distributors are able to bargain for price deviations); *id.* at ¶ 81 (denying that Gilbarco shares sensitive information with distributors); *id.* at ¶ 89 (agreeing that the "vast majority" of Gilbarco distributors operate under contracts that are terminable on 60 days' notice).

Plaintiffs dispute the wisdom of Gilbarco's strategy but do not present evidence that tends to exclude the possibility that Gilbarco acted unilaterally in pursuing this strategy. Plaintiffs' Response to G.S.F. 134, docket no. 239. The Court will not allow a jury to infer antitrust liability based on Gilbarco's business decision. "If any business justification is needed for such a termination, it is supplied by the manufacturer's business judgment that it is important to its marketing strategy and the maintenance of its dealer network not to have its goods sold at less than the suggested retail price," *Jeanery*, 849 F.2d at 1159, or, in this case, by non-exclusive dealers. It is nearly axiomatic in antitrust law that a manufacturer is free to refuse to deal with other parties as long as it does so independently. *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919); *Filco*, 709 F.2d at 1261.

The Court has concluded that plaintiffs have failed to produce direct or circumstantial evidence that reasonably tends to prove that Gilbarco and its distributors had a conscious commitment to a common scheme designed to achieve an unlawful objective or that the distributors' comments regarding Omega caused the terminations at issue. Defendants have produced plausible, independent reasons for their conduct and permitting an inference of an antitrust violation could penalize legitimate competition.

(2) *Reasonableness*

To establish a violation of Section 1, a plaintiff must show that the restraint is unreasonable. This may be established by showing that the restraint constitutes a per se violation, or by applying the Rule of Reason. *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1467 (9th Cir. 1986).

*Appendix*

Refusals to deal are generally not illegal per se. *Harkins Amusement Enter. v. General Cinema Corp.*, 850 F.2d 477, 486 (9th Cir. 1988); *O.S.C*, 792 F.2d at 1467-68. Exclusive dealing requirements are vertical non-price restraints;[7] these also are not illegal per se. *Harkins*, 850 F.2d at 486. Even when the manufacturer also acts as a distributor, in competition with its own distributors, courts apply Rule of Reason analysis to vertical non-price restraints. *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1356 (9th Cir. 1982).

A court should depart from the Rule of Reason to apply the per se rule only where a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Cascade Cabinet Co. v. Western Cabinet & Millwork*, 710 F.2d 1366, 1371 (9th Cir. 1983) (citations omitted). Plaintiffs have failed to allege facts that will support application of the per se rule to the dealer terminations. Thus, the Court relies upon the Rule of Reason.

To establish a violation under the Rule of Reason, a plaintiff must show "(1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually injures competition." *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988). This standard involves balancing the evidence of intent, the proffered justification, and the anti-competitive and procompetitive effects. *Les Shockley*

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7. A vertical restraint is an agreement between a seller and a purchaser of a product, or between a manufacturer and a dealer, that restricts the purchaser's or dealer's activities with respect to third parties. *Chuck's Feed & Seed Co. v. Ralston Purina Co.*, 810 F.2d 1289, 1294 n.2 (4th Cir.), *cert. denied*, 484 U.S. 827 (1987). A horizontal restriction, by contrast, involves an agreement between competitors. *Id.*

*Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507 (9th Cir. 1989).

In addition to presenting insufficient evidence of an agreement or conspiracy, plaintiffs cannot show actual injury to competition and thus have not shown that the restraints at issue were unreasonable. Proof of competitive harm is absolutely essential to a Rule of Reason case. *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 449 (9th Cir.) (holding that a restraint must have a significant anticompetitive effect in order to be found unreasonable); Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law* § 320b at 53 (revised ed. 1995) (absent evidence of harm, refusal to sell is "presumptively lawful"). A court may grant summary judgment for a Section 1 defendant where, as here, there is no evidence of harm to competitions.[8] *See Ryko Mfg. Co. v. Eden Svces*, 823 F.2d 1215, 1233 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988); *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339 (9th Cir.), *cert. denied*, 464 U.S. 820 (1983); *J.B.L. Enter., Inc. v. Jhirmack Enter., Inc.*, 698 F.2d 1011 (9th Cir.), *cert. denied*, 464 U.S. 829 (1983).

Plaintiffs attempt to show competitive harm in the form of supracompetitive retail prices. Their expert Leffler states in his declaration, "I have concluded that Gilbarco's and its competitors' prices of retail gasoline dispensers are in excess of competitive prices as a result of the oligopolistic structure of the industry and group practices of the group members." Leffler Decl. ¶ 6. Leffler

8. This would be true even if the restraint were per se illegal because plaintiffs still would have to show antitrust injury, which requires proof of harm flowing from the anticompetitive aspects of defendants' conduct. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1444 (9th Cir. 1995) (holding that plaintiff cannot recover damages for conduct that does not harm consumer welfare).

points to the very high profit available to Gilbarco and a policy of not cutting prices to get more business. Leffler Rep. at 11. He concludes that "Gilbarco's rational economic concern with how its decisions impact the industry price structure *imply* an industry in which price structure is above the competitive level." Leffler Rep. at 13 (emphasis added).

Nowhere in the report does Leffler explain or provide a rational basis for this *implication* of anticompetitive prices. In fact, Leffler admits in his deposition that he has not studied any of Gilbarco's competitors in the alleged market of manufacturing retail petroleum dispensers in the United States, or whether their prices exceed competitive levels. Leffler depo. at 61. Rather, as stated in the report, Leffler claims that from the statements of Gilbarco and the other industry participants and from price and profit levels, "I can infer that the prevailing prices in the industry are not competitive." Leffler Rep. at 10. Leffler's opinions and inferences are not supported by any credible evidence. The Court is not prepared to infer illegal behavior from the pricing strategy of and profits earned only by Gilbarco.

An expert opinion that is "wholly conclusory and devoid of reasoning" cannot defeat summary judgment. *M & M Medical Supplies & Svces, Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 165 (4th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 2962 (1993). Plaintiffs' evidence cannot as a matter of law be the basis for inferring competitive harm. Thus, the terminations and vertical restraints challenged here cannot be found unreasonable under Section 1 of the Sherman Act.

*Appendix*

B. *Sherman Act § 2 and RCW 19.86.040*

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

RCW 19.86.040 contains substantially the same language.

(1) *Attempted monopolization*

Plaintiffs allege attempted monopolization in violation of the Sherman Act § 2 and related state law violations. To state a private cause of action for damages for attempted monopolization, a plaintiff must show: (1) specific intent to control prices or to eliminate competition; (2) predatory or anti-competitive conduct directed at accomplishing that purpose; (3) a dangerous probability of success in achieving monopoly power; and (4) causal antitrust injury. *Rebel Oil*, 51 F.3d at 1433.

(a) *Dangerous Probability of Success*

The analysis of plaintiffs' Section 2 claim should begin with an assessment of market power. In order to present a Sherman Act § 2 claim, plaintiffs must establish a dangerous probability that defendants will achieve monopoly power in the relevant market. This probability is measured by the market power that the defendants possess in that market. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 113 S.Ct. 884, 122 L.Ed.2d 247, 259 (1993).

*Appendix*

Market power is defined by courts as the ability to control prices or to exclude competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264, 1278 (1956); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1414 (7th Cir. 1989); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986); Areeda & Hovenkamp, ¶ 501 at 86. Courts also have defined market power as "the ability to cut back the market's total output and so [to] raise price." *Ball Memorial*, 784 F.2d at 1335. A firm with market power can increase prices above competitive levels and thereby harm consumer welfare. *Rebel Oil*, 51 F.3d at 1434.

The Sherman Act is implicated only when that danger arises. *Spectrum Sports*, 113 S.Ct. at 891-92, 122 L.Ed.2d at 258 ("The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L.Ed.2d 628, 641 (1984) ("Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the zeal of a single aggressive entrepreneur."). Thus, the third element of the test for attempted monopolization, dangerous probability of success, requires a plaintiff to prove that the defendant has the ability to restrict output or to raise prices — in other words, to show that the defendant possesses "market power."

Market power may be established through two types of proof. First, a plaintiff may offer direct proof of restricted output and supracompetitive prices. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61, 106 S.Ct. 2009, 90 L.Ed.2d 445, 457-58 (1986);

*Rebel Oil*, 51 F.3d at 1434. None has been presented in this case. When a plaintiff lacks direct evidence that a defendant has market power, it may prove market power circumstantially through traditional market analysis.[9] *Bhan v. N.M.E. Hosp., Inc.*, 929 F.2d 1404, 1413 (9th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 617 (1991); *Ceiling & Interior Sys. Supply, Inc. v. U.S.G. Interiors, Inc.*, 878 F.Supp. 1389, 1394 (W.D. Wash. 1993), *aff'd without op.*, 37 F.3d 1504 (9th Cir. 1994).

Market definition is a question of fact. *Oltz*, 861 F.2d at 1446. The Leffler Report defines the relevant product market as the retail market for petroleum dispensing equipment. Leffler Rep. at 2. This market definition is reasonable in that it reflects the fact that Gilbarco's exclusive dealing requirement extends only to its line of retail fuel dispensers. G.S.F. 25. Therefore, the Court adopts Leffler's definition of the relevant product market for the purposes of this motion.

Plaintiffs cannot prove market power in this market with respect to the distributor defendants. These defendants are not participants in the relevant market. The only basis for a claim against these defendants is their alleged conspiracy with Gilbarco in the terminations of ATS and Kelley. There is no allegation that the distributors were attempting to monopolize the distribution market. Thus, no further inquiry is required as to these defendants.

As to Gilbarco, plaintiffs cannot show market power because output in the relevant market is not restricted. In their market analysis, plaintiffs place much reliance on Gilbarco's market share

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9. Market analysis is a three-step process: (1) define the relevant product and geographic market; (2) assess the defendant's market share within that market; (3) assess barriers to entry or increased output in that market. *Rebel Oil*, 51 F.3d at 1434.

in the manufacturing market and upon the barriers to new entry into that market.[10] These factors alone cannot establish market power. *Rebel Oil*, 51 F.3d at 1441. "The ultimate inquiry in any attempted monopolization case remains whether the defendant has or might reasonably come close to having the ability to control output and prices." *Indiana Grocery*, 864 F.2d at 1414. As long as Gilbarco's competitors have the ability to increase output in response to a contraction by Gilbarco, plaintiffs have not shown market power. *Ball Memorial Hosp.*, 784 F.2d at 1336. A firm cannot extract supracompetitive prices if buyers are free to purchase competitors' products. *General Business Sys. v. No. American Philips Corp.*, 699 F.2d 965, 972 (9th Cir. 1983).

The evidence demonstrates that industry-wide output increased 101% during 1992-94 while prices decreased. G.S.F. 42. Plaintiffs dispute this statement of fact, but the evidence they cite as the basis of their dispute does not, in fact, controvert the fact of increased output both industry-wide and by Gilbarco. Plaintiffs cite Leffler's opinion that Gilbarco and the other manufacturers "adjust output" in order to maintain prices. Leffler Decl. ¶ 15. This assertion is not supported by any evidence or demonstrated by economic theory or case law. *See* Second Folsom Decl. ¶ 20, Exh. B to Hancock Decl., docket no. 247. Further, plaintiffs do not dispute that Gilbarco was able to increase capacity in 1994 by adding employees, incurring overtime expenses, and adding capital improvements costing less than $200,000, Pretrial Order, Admitted Facts ¶ 18, or that Gilbarco's marketing competitors also increased their output in recent years, G.S.F. 45.

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10. Plaintiffs allege that Gilbarco's market share is nearly 60%. Leffler Rep. at 2. For the first four months of 1995, Gilbarco's petroleum dispensing equipment held a 55% market share; no more recent figures have been presented to the Court and plaintiffs have presented no evidence that Gilbarco's market share has ever exceeded 55%.

Gilbarco also presents deposition testimony that its rivals could increase their capacity in the short term. G.S.F. 46 (citing Kendall depo. at 1072). Plaintiffs dispute this on the basis that it is speculative, but their expert Leffler refers in his declaration to "the ease with which manufacturers [i.e., competitors] were able to increase output in fiscal 1995." Leffler Decl. ¶ 15. Leffler quotes without disputing opposing expert Folsom's opinion that "the record in this matter does not support the assumption that Tokheim and Wayne [two of Gilbarco's competitors] are operating at full capacity." Leffler Decl. at 7 n.9 (quoting Folsom Decl. ¶ 45). It appears, therefore, that plaintiffs' expert agrees that Gilbarco's competitors could increase capacity in the short term.

There also is uncontroverted evidence that some of Gilbarco's prices have declined in the relevant market. Plaintiffs have presented evidence only of Gilbarco's prices, not of its competitors' prices, but this evidence shows that Gilbarco lowered prices on some of its products recently. G.S.F. 39; Leffler Rep. Table 1; Exh. A to Hancock Decl. (interoffice memorandum describing reduction in list price for certain dispensers). Such behavior is uncharacteristic of a firm that enjoys market power. Based on the foregoing evidence, the Court cannot permit an inference of market power; indeed, this evidence disproves market power. *See Ball Memorial Hosp.*, 784 F.2d at 1336.

Plaintiffs attempt to avoid the inevitable conclusion that Gilbarco lacks market power by pointing to Gilbarco's high profits. Leffler Rep. at 11-12. In the absence of comparisons to similar firms, this is meaningless. *Forsyth v. Humana, Inc.*, 827 F.Supp. 1498, 1510 (D. Nev. 1993) ("[A]ny allegation that Defendants made 'excessive' profits necessarily requires that Plaintiffs compare the profit performance of Humana with that of its competitors."). High profits do not show market power.

Plaintiffs also seek to support their claim by arguing that the oligopolistic structure of the relevant market permits Gilbarco, in *cooperation* with the other manufacturers, to regulate output. Leffler Decl. ¶ 15. Even if this were true, it would not be actionable under Section 2 of the Sherman Act.[11] "To pose a threat of monopolization, one firm *alone* must have the power to control market output and exclude competition. An oligopolist lacks this unilateral power. . . . We recognize that a gap in the Sherman Act allows oligopolies to slip past its prohibitions, but filling that gap is the concern of Congress, not the judiciary." *Rebel Oil*, 51 F.3d at 1443 (citations omitted). Plaintiffs' allegation of oligopolistic activity therefore does not prove that Gilbarco has market power.

(b) *Causal Antitrust Injury*

Evidence of market power also is necessary to proving the fourth element of attempted monopolization. Causal antitrust injury is harm that flows from an anticompetitive aspect or effect of the defendants' conduct. *Rebel Oil*, 51 F.3d at 1433. The plaintiff may recover only if the defendant's conduct has harmed consumer welfare. *Id.*; *cf. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. __, 113 S.Ct. 2578, 2589, 125 L.Ed.2d 168, 187 (1993) ("Even an act of pure malice by one business

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11. In fact, this assertion is unsupported. Leffler infers cooperation largely from the parity in pricing by different manufacturers. Leffler Rep. ¶¶ 6-8. Parallel pricing need not imply cooperation among competitors. *See In re Coordinated Pretrial Proceedings*, 906 F.2d at 444 (stating that the fact that manufacturers follow one another in pricing does not offend the Sherman Act); Areeda & Hovenkamp, ¶ 1419.1b1 at 817-18 (positing a concentrated market of four firms selling the same product and stating that cartel-like parity in pricing is a rational economic response to market conditions and that such "tacit coordination" does not implicate antitrust laws).

competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition . . . ."). Because plaintiffs cannot show that defendants possess the market power to restrict output or to raise prices, they cannot show the harm to consumer welfare that is a prerequisite to antitrust injury.

(c) *Anticompetitive Intent and Conduct*

Even if plaintiffs could show market power, their claim would fail on both the first and second elements required to prove attempted monopolization. Plaintiffs present no evidence of anticompetitive intent, the first element of the test.[12] In the absence of a specific intent to monopolize, a plaintiff may prove the second element of the attempted monopolization test, anticompetitive conduct, only by presenting "evidence of conduct amounting to a substantial claim of restraint of trade or conduct clearly threatening to competition or clearly exclusionary." *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1374 (9th Cir. 1983) (quotations omitted). This standard is essentially the same as the Rule of Reason standard under Section 1. *Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 448 (9th Cir. 1993); *Cascade Cabinet*, 710 F.2d at 1374 n.3; *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 543 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); *Cal Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727, 737 (9th Cir. 1979). Thus, for the same reasons that plaintiffs fail to raise a triable issue as to the reasonableness of defendants' conduct

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12. Intent that violates the antitrust laws is not simply intent to harm competitors, for "to penalize this intent is to penalize competition." *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1339 (7th Cir. 1986). The better measure of intent is an objective test that considers whether there is a competitive justification for the conduct. *Id.*

under Section 1, that conduct cannot be considered anticompetitive under Section 2.

(2) *Conspiracy to Monopolize*

Plaintiffs next allege conspiracy to monopolize in violation of Section 2 of the Sherman Act and related state law. In order to show conspiracy to monopolize, the plaintiffs must show a conspiracy that is designed to create a monopoly. *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 993 (11th Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 2710, 129 L.Ed.2d 837 (1994); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981).

For the same reasons that plaintiffs have not raised a material issue of fact on the issue of concerted action for their Sherman Act § 1 claim, they cannot show conspiracy under Section 2. Although the standards are not identical, both require a plaintiff to show concerted activity. *Eichman v. Fotomat Corp.*, 880 F.2d 149, 162-63 (9th Cir. 1989); *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 1000 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). Plaintiffs have presented no evidence that Gilbarco acted in concert with its distributors or others in furtherance of monopolization. Therefore, summary judgment for defendants is appropriate on this claim.

C. *Clayton Act § 3 and RCW 19.86.050*

Section 3 of the Clayton Act, 15 U.S.C. § 14, provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or

> resale within the United States . . . , or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

RCW 19.86.040 contains substantially the same language.

Section 3 applies to exclusive dealing arrangements that protect a substantial portion of the relevant market from competition. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 325-29, 81 S.Ct. 623, 5 L.Ed.2d 580, 585-88 (1961); *Chuck's Feed & Seed Co., Inc. v. Ralston Purina Co.*, 810 F.2d 1289, 1293 (4th Cir.), *cert. denied*, 484 U.S. 827 (1987). In order to determine whether an exclusive dealing arrangement is likely to foreclose the entry into a substantial portion of the market by competing manufacturers to implicate Section 3, the Court must evaluate: (1) the line of commerce involved; (2) the geographical area affected; and (3) the share of the relevant market that is affected. *Chuck's Feed*, 810 F.2d at 1293.

If the Court finds a substantial portion of the market foreclosed, it then must balance the foreclosure against the pro-competitive justifications for the exclusive dealing arrangement. *Id.* at 1294. This inquiry is similar to Rule of Reason analysis under Section 1 of the Sherman Act. William Holmes, *Antitrust Law Handbook* 454 (1995). However, Section 3 of the Clayton Act requires a lesser showing of competitive harm than does the

Sherman Act. *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1304 n.9 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982). That is because Section 3 is an "incipiency" statute, intended to address probable harm. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356-57, 42 S.Ct. 360, 66 L.Ed. 653 (1922).

The Court, considering the evidence taken as a whole, concludes that the plaintiffs have made a sufficient showing to avoid summary judgment on their exclusive dealing claim. Defendants argue that the market foreclosure should be measured as the 20% of all dispensing equipment distributors that are under contract with Gilbarco. Defendants' Memorandum in Support, docket no. 218, at 26; G.S.F. 87. Plaintiffs suggest that the foreclosure should be measured by Gilbarco's market share of dispenser sales and place this figure above 50%. Plaintiffs' Memorandum in Opposition, docket no. 238, at 33-34. The Court need not decide which figure, if either, is correct because even the 20% posited by defendants is sufficient to create a jury question when considered in conjunction with plaintiffs' other evidence. *See Twin City Sportservice*, 676 F.2d at 1304 (24% foreclosure sufficient to establish Section 3 violation).

Plaintiffs support their claim by alleging other factors that may contribute to potential harm, such as the widespread use of exclusive dealing contracts in the relevant market and the high market concentration. Plaintiffs' Memorandum in Opposition, docket no. 238, at 34; *see Standard Oil Co. v. United States*, 337 U.S. 293, 311-12, 69 S.Ct. 1051, 93 L.Ed. 1371, 1384-85 (1949) (industry-wide use of exclusive dealing provisions increases probability of harm); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1447-48 (9th Cir. 1995) (disciplined oligopoly can create anticompetitive effects under Clayton Act);

*Ryko Mfg. Co. v. Eden Svces.*, 823 F.2d 1215, 1233-35 (8th Cir. 1987) (customer loyalty to specific distributors and barriers to entry for new distributors may lead to anticompetitive effects), *cert. denied*, 484 U.S. 1026 (1988).

Defendants present pro-competitive justifications for the exclusive dealing provisions, such as avoidance of free rider problems, protection of trade secrets, and preservation of incentives for dealers to learn about products. Plaintiffs dispute both the truth and rationality of these justifications and argue that defendants could have achieved their objectives through less restrictive means. Defendants also rely on the proposition that exclusive dealing provisions enhance interbrand competition. *See, e.g., Joyce Beverages of New York, Inc. v. Royal Crown Cola Co.*, 555 F.Supp. 271, 279 (S.D.N.Y. 1983). While that may be true as a general matter, the inquiry in each case must take into account the specific industry involved and the evidence of probable harm offered by the plaintiffs. Because the Clayton Act imposes a lower threshold for proof of harm than the Sherman Act and because there are disputed issues of fact, the Court denies summary judgment on this claim.

II. *State Law Claims*

A. *Intentional Interference Claims*

Plaintiffs seek recovery against RPE, SME, and Waldock for interference with the plaintiff's contractual relationships and unfair competition. These tort claims must be resolved by applying state law, but the parties disagree as to which state's law applies. Plaintiffs contend that Washington's choice of law analysis calls for the application of Texas law to ATS's tort claims, Pennsylvania law to Kelley's tort claims, and Washington law to Omega's claims.

*Appendix*

The defendants maintain that Washington law applies to all state law claims.

(1) *Applicable Law*

This Court must apply Washington's choice of law rules in determining which state's law applies to the plaintiffs' tort claims against defendants. In Washington, a "most significant relationship" test has been developed for resolving choice of law questions in actions sounding in tort. *Southwell v. Widing Transportation*, 101 Wn.2d 200, 204 (1984); *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577 (1976).

Plaintiffs offer no conflicts analysis, but instead baldly state that the law of other states applies. Under Washington law, an actual conflict between the law of Washington and the law of another state must be shown to exist before Washington courts will engage in a conflict of law analysis. *Burnside v. Simpson Paper Company*, 123 Wn.2d 93, 101 (1994). Because plaintiffs have failed to demonstrate a conflict among the laws of the various states here,[13] the Court need not engage in a conflicts analysis and is free to apply Washington law. However, the Court also has applied Washington's significant relationship test and concludes that Washington law is properly applied to all tort claims against the defendants.

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13. Plaintiffs concede that Pennsylvania and Washington laws are the same, and they fail to identify how Texas law differs from Washington law. Plaintiffs do contend, however, that North Carolina law differs from Washington law because of a North Carolina law (Gen. Stat. § 75-5(b)(2)), which prohibits a manufacturer from requiring exclusivity. *See* Plaintiffs' Opposition Brief, docket 241, at 10. The relationship between the statute and the plaintiffs' claims against the non-Gilbarco defendants is too tenuous to alter the Court's conflicts analysis.

The most significant relationship test requires the Court to evaluate the contacts with each interested jurisdiction to determine which jurisdiction has the most significant contacts with the parties and occurrences. *Southwell*, 101 Wash.2d at 204, 676 P.2d at 480. The Court also must consider the public policies of the various concerned jurisdictions in determining which state has the most significant relationship to the plaintiffs' claims. *Id.* Here, the interests of several states are implicated. Plaintiffs Omega and Kelley are Washington corporations, and ATS is a Texas corporation wholly owned by Omega. Defendant RPE has its principal place of business in Minnesota, Waldock is a resident of Washington, and SME is a Washington corporation with its principal place of business in Washington. The defendants' conduct giving rise to plaintiffs' claims occurred in Washington, Utah, Illinois, North Carolina and elsewhere. Any damage to Kelley caused by the conduct of the non-Gilbarco defendants occurred primarily in Pennsylvania. Any damage to plaintiff ATS occurred for the most part in Texas.

Considering these factors as a whole, the Court concludes that, while several states have contacts with the parties and occurrences, no state has a more significant relationship to plaintiffs' tort claims than Washington. The allegedly wrongful acts were directed primarily at Omega, a Washington corporation, and, according to plaintiffs, Omega will ultimately bear a substantial portion of the financial losses allegedly caused by the defendants' conduct.[14] Moreover, no other state has a public

14. In Plaintiffs' Supplemental Trial Briefing, filed on November 20, 1995, during trial, the plaintiffs conceded that application of Washington's most significant relationship test to the plaintiffs' claims against Gilbarco results in the application of either Washington or North Carolina law. The plaintiffs go on to argue, however, that there is no need to resolve which of the two laws should apply because there is no conflict between the two states' laws on unfair competition. Because there is a "false conflict," they argue, Washington law should apply.

policy interest that predominates, or is greater than Washington's. For these reasons, the law of Washington is properly applied to plaintiffs' tort claims.

(2) *Interference by Distributor Defendants*

Plaintiff Omega claims that the distributor defendants interfered with its business relationship with Gilbarco, as well as its relationships with other potential distributors. The other plaintiffs, ATS and Kelley, contend that the distributor defendants intentionally interfered with their relationship with Gilbarco by persuading Gilbarco to terminate them as distributors.

To make out a claim for tortious interference, the plaintiffs must prove:

1. The existence of a valid contractual relationship or business expectancy;

2. That defendants had knowledge of that relationship;

3. An intentional interference inducing or causing a breach or termination of the relationship or expectancy;

4. That defendants interfered for an improper purpose or used improper means; and

5. Resultant damages.

*Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 28, 829 P.2d 765 (1992). Once these elements are established, the defendant bears the

burden of justifying the interference or showing that the actions are privileged. *Pleas v. Seattle*, 112 Wn.2d 794, 800, 804, 774 P.2d 1158 (1989).

The distributor defendants contend that summary judgment should be granted on plaintiffs' intentional interference claims because plaintiffs have failed to offer any evidence of improper purpose or improper means, and the evidence demonstrates that the defendants' conduct was not the cause of the termination of plaintiffs' relationships with Omega. As to the matter of causation, the Court concludes that there are issues of material fact relating to whether the distributor defendants' conduct induced or caused the breach, which preclude summary judgment based on this element.[15] As to the other required element at issue, however, the Court agrees with the distributor defendants that plaintiffs have failed to raise an inference of improper purpose or wrongful means.

"[A] cause of action for tortious interference arises from either the defendant's pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships." *Pleas*, 112 W.2d at 803-804. Interference can be wrongful by reason of a statute or other regulation, or a recognized rule of common law,

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15. Causation in the context of plaintiffs' wrongful interference claim differs from the Sherman Act requirement that there be a conspiracy or agreement to restrain trade. In the context of a Sherman Act claim, an allegation that defendants urged Gilbarco to terminate certain distributors is insufficient to state a Sherman Act claim. In an intentional interference claim, however, the element of causation is satisfied where there is an inducement to act. Moreover, "[t]he issue of proximate cause is broader than cause in fact and involves 'mixed considerations of logic, common sense, justice, policy, and precedent.'" *Pleas*, 112 Wn.2d at 807 (quoting *King v. Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974)).

or an established standard of trade or profession. *Id.* at 804. To establish a claim for tortious interference, the plaintiffs must show that the interference resulting in injury was wrongful "by some measure beyond the fact of the interference itself." *Id.* (quoting *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 209-10, 582 P.2d 1365 (1978)). No question of privilege arises unless the interference would be wrongful but for the privilege. *Id.* "When one acts to promote lawful economic interests, bad motive is essential, and incidental interference will not suffice." *Birkenwald Distrib. v. Heublein, Inc.*, 55 Wn. App. 1, 11, 776 P.2d 721 (1989).

The plaintiffs contend that the conduct of the distributor defendants, specifically, reading the Letter and expressing concerns about Omega at the DAC meeting, were "wrongful" because the defendants' purpose was not to discuss legitimate business interests but rather to reduce competition through unlawful means. Plaintiffs have failed to establish, however, that any of the actions of the distributor defendants at the meeting were improper or unlawful. The defendants had a legitimate business interest in voicing concerns at the DAC about another distributor, and even in urging Gilbarco to terminate its business relationship with that distributor. The plaintiffs have failed to establish that the acts of the distributor defendants violated the antitrust laws or otherwise constituted a restraint of trade. Moreover, plaintiffs offer no evidence that the defendants acted purposefully to harm the plaintiffs. "Asserting one's rights to maximize economic interests does not create an inference of ill will or improper purpose." *Birkenwald Distrib.*, 55 Wn. App. at 12. As a result, the distributor defendants are entitled to summary judgment on plaintiffs' claims of intentional interference.

(3) *Intentional Interference Claims Against Gilbarco re: Omega's Business Expectancies with Other Distributors*

The plaintiffs also bring intentional interference claims against Gilbarco, alleging that Gilbarco intentionally interfered with Omega's business relationship with three potential distributors: J&M Pump Service, Inc.; Reliable Oil Equipment; and R.W. Mercer Company. The Court concludes that the issue of whether Gilbarco intentionally interfered with Omega's relationship with these potential distributors presents questions of fact that preclude summary judgment. Accordingly, the Court denies Gilbarco's motion for summary judgment on the plaintiffs' intentional interference claims.

B. *Consumer Protection Act Claims — Fifth Cause of Action*

The plaintiffs bring Consumer Protection Act claims against all defendants based on the conduct which is the subject of plaintiffs' antitrust and other claims. The Court concludes that the distributor defendants are entitled to summary judgment on plaintiffs' CPA claims against them. Gilbarco's motion for summary judgment on the CPA claim, however, is denied.

As to the distributor defendants, the plaintiffs have failed to show that these defendants have engaged in an unfair method of competition. This Court has already found that the distributor defendants had a legitimate business interest in raising concerns about Omega at the DAC meeting and in urging Gilbarco to terminate Omega as a distributor. Plaintiffs have alleged no further anticompetitive or unfair method of competition on the part of the distributor defendants. Rather the gist of plaintiffs' arguments is that Gilbarco's alleged exclusive dealing arrangement forms

the basis for this claim. Gilbarco's conduct provides no basis for this claim against the distributor defendants.

The plaintiffs' CPA claims against Gilbarco, on the other hand, are tied closely to plaintiffs' Clayton Act claim based on exclusive dealing, and its Robinson-Patman Act claim based on unlawful price discrimination, which has been severed. Assuming plaintiffs can establish a violation by Gilbarco of these federal acts, plaintiffs may also be able to recover on their CPA claims based on the same conduct. Accordingly, defendant Gilbarco's motion for summary judgment on plaintiffs' CPA claims must be denied.

IT IS SO ORDERED.

DATED this *28th* day of November, 1995.

*/s/ Thomas S. Zilly*
THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE